



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF MANAGEMENT OF BUDGET

DEPARTMENT OF THE TREASURY

[FRL-10011-02-OW]

Water Infrastructure Finance and Innovation Act Program (WIFIA) Criteria Pursuant to the Further Consolidated Appropriations Act, 2020

AGENCY: Environmental Protection Agency (EPA), Office of Management and Budget (OMB), and Department of the Treasury (Treasury).

ACTION: Notice.

SUMMARY: The U. S. Environmental Protection Agency (EPA), the Office of Management and Budget (OMB), and the Department of the Treasury (Treasury) are providing potential applicants to the Water Infrastructure Finance and Innovation Act (WIFIA) Program with information about budgetary screening criteria that will be applied to projects in accordance with the Further Consolidated Appropriations Act, 2020.

DATES: The effective date of the contents of this notice is [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: For additional EPA information related to this notice, please contact Jordan Dorfman, Office of Water (mail code 4202M), Environmental Protection Agency, 1200 Pennsylvania Avenue, N.W., Washington, DC, 20460; telephone number: (202) 564-0614; or e-mail: Dorfman.Jordan@epa.gov (preferred). For additional OMB

information related to this notice, please contact Andrea Grossman, Environment Branch, Office of Management and Budget, 757 17th Street, N.W., Washington, DC, 20006; telephone number: (202) 395-4756; or e-mail: AGrossman@omb.eop.gov. For additional Treasury information related to this notice, please contact Colleen Mills, Office of Federal Program Finance, Department of the Treasury, 1500 Pennsylvania Avenue, N.W., Washington, DC, 20220; telephone number: (202) 622-5447; or e-mail: Colleen.Mills@treasury.gov.

SUPPLEMENTARY INFORMATION:

I. Statutory Requirement

The following criteria are published pursuant to the Water Infrastructure Finance and Innovation Program Account (WIFIA Program) heading in the Further Consolidated Appropriations Act, 2020 (Public Law 116-94). Proviso 4 under the WIFIA Program heading requires the publication of criteria that “limit Federal participation in a project consistent with the requirements for the budgetary treatment provided for in section 504 of the Federal Credit Reform Act of 1990 [(FCRA; 2 U.S.C. 661c)] and based on the recommendations contained in the 1967 Report of the President’s Commission on Budget Concepts [(1967 Report)].” Proviso 7 under the WIFIA Program heading requires “the use of direct loans or loan guarantee authority under [the WIFIA Program] heading for direct loans or commitments to guarantee loans for any project shall be in accordance with the criteria published pursuant to this Act.”

II. Background

The Federal budget is presented on a cash basis. This is driven by many considerations, among which is a need to reflect the statutory requirement that the Federal Government records full cost at the time an obligation is entered into, as required by 31 U.S.C. 1501, known as the recording statute. If an activity is determined to be Federal in nature, then, consistent with 31

U.S.C. 1501, Federal obligations are recorded in the budget at the full value of the activity. The question of whether or not to include a project or asset in the budget hinges on whether the project or asset in question is Federal or non-Federal in nature. When faced with a project or asset where this Federal designation is unclear, the 1967 Report recommends “a comprehensive budget, with very few exclusions” and states that “borderline agencies and transactions should be included in the budget unless there are exceptionally persuasive reasons for exclusion.”¹ The 1967 Report notes the inherent difficulty in making a Federal or non-Federal determination in many cases and suggests a series of questions, which guide the criteria below, yet notes that “the answer to no one of these questions is conclusive” and decisions involve “a net weighing of as many relevant considerations as possible.”²

The most significant statutory exception to the cash basis of the Federal budget is section 504 of FCRA, 2 U.S.C. 661c, which requires the budgetary treatment of direct loans and loan guarantees provided by the Government to a non-Federal borrower to be recorded using net present value. Regardless of the identity of the borrower, however, requiring that a Federal project or asset be recorded in the budget on a net present value basis would be inconsistent with 31 U.S.C. 1501, existing Government-wide guidance, and a cash budget. Therefore, to “limit Federal participation in a project consistent with the requirements for the budgetary treatment provided for in section 504 of [FCRA] and based on the recommendations contained in the [1967 Report],” as required by Proviso 4 under the WIFIA Program heading in Public Law 116-94, only non-Federal projects are eligible for WIFIA loans and loan guarantees.

III. Federal Asset Screening Criteria and Process

¹ *The 1967 Report of the President’s Commission on Budget Concepts*, pg. 25.

² *Id.*

The following criteria are published pursuant to Proviso 4 under the WIFIA Program heading in Public Law 116-94 and apply only to loans and loan guarantees issued under the Water Infrastructure Finance and Innovation Act of 2014 (Public Law 113-121, title V, subtitle C (33 U.S.C. Chapter 52)). The criteria and procedures identified in this notice do not apply to any Notices of Funding Availability (NOFA) published by the WIFIA Program prior to the publication of this notice. In order to comply with Proviso 7 under the WIFIA heading in Public Law 116-94, a proposed WIFIA-financed activity will be evaluated using the two initial screening questions and the sixteen criteria listed below as a guide. The criteria will be considered cumulatively and individually when evaluating project eligibility. In addition to the criteria listed below, the U.S. Environmental Protection Agency (EPA) and the Office of Management and Budget (OMB) will consider any additional information that may bear on the Federal Government's current and future expected involvement in a WIFIA project. Finally, as required by the Proviso 10 of Public Law 116-94, none of the direct loans or loan guarantee authority made available under Public Law 116-94 shall be available for any project unless the Administrator and the Director of OMB have certified in advance in writing that the direct loan or loan guarantee, as applicable, and the project comply with the criteria developed and published pursuant to Public Law 116-94.

EPA will continue to implement existing elements of the WIFIA program consistent with prior practice, supplemented by the criteria and procedures provided in this notice. EPA will publish a NOFA that will include the Administrator's targeted priorities for each new round of WIFIA financing and will invite prospective borrowers to submit letters of interest to EPA. EPA will review those letters for statutory eligibility and, in coordination with OMB, apply the

screening criteria and procedures provided in the NOFA and this notice to determine funding eligibility before formally inviting prospective applicants to apply for WIFIA funding.

Prospective projects will be evaluated by EPA based on the selection process articulated in each NOFA. EPA will then engage with OMB to review how the criteria in this notice were applied to the potential projects. EPA and OMB must reach preliminary agreement that each of the projects is non-Federal before EPA formally invites such projects to apply for WIFIA financing.

EPA will also inform OMB of any new information or changes to this preliminary assessment of the screening questions and criteria listed below for individual projects that are progressing through the full WIFIA evaluation process following receipt of complete project financing applications, and will terminate the process if projects are determined not to comply with FCRA based on that new information.

EPA and OMB encourage prospective WIFIA Program borrowers to evaluate the screening questions and criteria in this notice and provide sufficient information in letters of interest and formal applications that address any federal asset questions or concerns, including the type of project seeking WIFIA funding under 33 U.S.C. 3907(b) and whether or not the loan will satisfy EPA's template term sheet and standard loan agreement provisions.

IV. Initial Federal Asset Screening Questions

- A. Is the project, in whole or in part, a project currently authorized by Congress for the Army Corps of Engineers or Bureau of Reclamation to construct?³

³ A project authorized by an Act of Congress to be built by the Army Corps of Engineers or Bureau of Reclamation is ineligible for WIFIA financing. However, a project that may connect to, or be tangentially related to, such a project, may be eligible depending on the factual circumstances (e.g., a project to upgrade a water distribution

- B. Is the project, in whole or in part, a local cost share requirement for an Army Corps of Engineers or Bureau of Reclamation project?⁴

V. Federal Asset Screening Criteria

Structure of the Project

1. To what degree does the Federal Government comprise the WIFIA project's user base?
2. Does the project involve the use of the Federal Government's sovereign power (excluding, e.g., National Environmental Policy Act (NEPA) review)?
3. Does the WIFIA project require the construction or acquisition of an asset for the special purpose of or use by the Federal Government?
4. To what degree does the Federal Government direct the contracting process for the WIFIA project?
5. Is there a specific authority provided to the WIFIA project by an Act of Congress without which the WIFIA project could not proceed?
6. What is the Federal Government's role in the governance of the project? In other words, what is the role of the Federal Government in selecting management or overseeing the project (including, but not limited to, approval of contract scope and step-in rights, or as a member of a

system that is connected to an Army Corps of Engineers- or Bureau of Reclamation-constructed water source may be eligible for WIFIA financing in some circumstances). Furthermore, a project at a local municipal facility might not be deemed ineligible simply because it was originally built by the Army Corps of Engineers or Bureau of Reclamation. Such questions will need to be resolved on a case-by-case basis.

⁴ WIFIA authorizes loans to support local cost-sharing requirements. *See* 33 U.S.C. 3908(b)(8) ("The proceeds of a secured loan under this section may be used to pay any non-Federal share of project costs required if the loan is repayable from non-Federal funds."). However, such a loan that would finance a project that is in whole, or in part, a project authorized by Congress for the Army Corps of Engineers or the Bureau of Reclamation to construct would not meet the Federal asset screening process. Project applicants are encouraged to review all applicable statutory requirements before seeking WIFIA financing.

board of directors), both during construction as well as in terms of operations and ongoing maintenance?

7. Is this project part of a larger Federally authorized project (not limited to but consistent with the initial screening criteria) and if so, does the project under consideration for a loan or loan guarantee constitute a useful segment—either a planning segment or a useful asset—as defined in the Capital Programming Guide (supplement to OMB Circular A-11)?

Financing of the Project

8. Does the Federal Government provide resources for the WIFIA Federal loan repayment?

9. Will the WIFIA project meet the nonsubordination requirement provided in 33 U.S.C. 3908(b)(6)?

10. Does the WIFIA project depend on the Federal Government making other in-kind contributions (land, real estate, right-of-way, etc.)?

11. Is non-Federal financing available for the project?

12. If the project is required to obtain an investment-grade rating opinion letter, per 33 U.S.C. 3901(4) and 3908(a)(3), to what extent does the rating opinion letter consider Federal support as a credit enhancement?

Project Liabilities

13. To what degree will the Federal Government bear funding liabilities associated with the WIFIA project not otherwise appropriated by Congress or captured in the loan subsidy?

14. Is the risk to the Federal Government low relative to the private sector for the financing of the WIFIA project?

15. To what degree does the Federal Government own or is the Federal Government contractually obligated to complete, maintain, or repair damage to the WIFIA project?

16. Is the Federal Government liable for unforeseen costs (e.g., environmental impacts, damage from natural disasters, or cost overruns) either before, during, or after completion of the WIFIA project?

VI. Certification

The Further Consolidated Appropriations Act, 2020 (Public Law 116-94) requires that the Administrator of EPA, the Secretary of the Treasury, and the Director of OMB certify that criteria developed for project eligibility for direct loans and loan guarantees authorized by the Water Infrastructure Finance and Innovation Act of 2014 are compliant with the first paragraph found under the “Water Infrastructure Financing and Innovation Program Account” heading in the Further Consolidated Appropriations Act, 2020. The Administrator, the Secretary, and the Director certify that the criteria developed meet the aforementioned requirement.

Andrew Wheeler,
Administrator,
Environmental Protection Agency.

Russell Vought,
Acting Director,
Office of Management and Budget.

Steven Mnuchin,

Secretary,

Department of the Treasury.

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